Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers	)	CC Docket No. 00-256
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation	)	CC Docket No. 98-77
	)	
Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers	)	CC Docket No. 98-166

RURAL CONSUMER CHOICE COALITION
OPPOSITION TO PETITIONS FOR RECONSIDERATION

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I. INTRODUCTION & SUMMARY

The Rural Consumer Choice Coalition ("RCC Coalition"), and its members, AT&T, General Communication Inc. and Western Wireless, respectfully submit this opposition to the petitions for reconsideration of the Commission's *MAG Order*[1] filed by the National Telephone Cooperative Association (NTCA), Alliance of Independent Rural Telephone Companies (AIRTC), South Dakota Telecommunications Association (SDTA), Plains Independent Rural Companies (Plains Companies), The Western Alliance (Western Alliance), and Century Telephone Companies ("CenturyTel") (collectively "ILEC Petitioners").

The NTCA, AIRTC, SDTA, and Western Alliance all challenge the Commission's long-settled decision that, once universal service support has been made explicit, it must be available to all eligible telecommunications carriers and competitive neutrality compels that the same amount of support per line be given to carriers competing in the same market. This has been one of the bedrock principles of universal service since the Commission first implemented the 1996 Act: "[T]he program must treat all market participants equally – for example, subsidies must be portable – so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers."[2] The contrary approach advocated by petitioners – providing different levels of support for different entities – would represent an unprecedented level of government manipulation of the market.

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[1] *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, FCC 01-304 ("*MAG Order*" or "*Order*").

[2] *Alenco v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000) ("*Alenco*").

NTCA, AIRTC, SDTA and Western Alliance fundamentally misconceive of the purpose of universal service support under the Telecommunications Act of 1996 (1996 Act). The universal service principles in Section 254 of the 1996 Act focus on ensuring that *consumers* have "affordable" rates for telephone service that were "reasonably comparable" to the rates charged in urban areas.[3] NTCA, AIRTC, SDTA and Western Alliance seek to convert these protections for *consumers* into a massive corporate welfare program to bail out incumbent LECs whose costs are above those of their competitors. Universal service was not meant to insulate incumbent LECs from the market discipline of competition.

Petitioners' claim that full and equal portability of universal service support between incumbent eligible telecommunications carriers and competitive telecommunications carriers violates Section 254(e) has been expressly rejected by the United States Court of Appeals for the Fifth Circuit. In the course of rejecting that argument, the court correctly observed:

> What petitioners seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is *protection from competition*, the very antithesis of the [1996] Act.[4]

Petitioners' assertions that the carrier common line charge is not a subsidy not only contradict prior Commission decisions, but also ignore long-recognized principles of cost-causative recovery that have stood repeated court challenges. Under cost-causative recovery principles, in the absence of universal service considerations, the Commission could require that the incumbent LECs recover all non-traffic sensitive costs from end users. To protect universal service, the Commission capped the SLC. Once capped, these costs that would have been

[3] 47 U.S.C. 254(b)(3).

[4] *Alenco*, 201 F.3d at 622 (emphasis added).

recovered through the SLC must be recovered in rates charged to other customers – the core definition of an implicit subsidy.[5]

Plains Companies' petition to reverse the reallocation of TIC costs must be rejected because it ignores all law since the D.C. Circuit's decision in *Competitive Telecommunications Association v. FCC ("CompTel I")*.[6] Plains Companies' request would fail to address the D.C. Circuit's directions on remand in *CompTel I*.

The Commission should reject as unwarranted the requests by CenturyTel and NTCA to roll back implementation of the SLC increases that took effect on January 1, 2002. The intrastate access rate issues cited by CenturyTel are the province of the state commissions, and are properly addressed to those bodies. Moreover, there is no evidence of any harm to universal service from these SLC increases. There is likewise no evidence that markets have not been able fully to adjust to the increase of the multiline business SLC cap to $9.20 on January 1, 2002, and thus NTCA's request for reconsideration of the FCC's rejection of a phase-in of that SLC cap increase should be rejected.

Finally, the Commission should reject NTCA's request that the SLC on centrex lines for public institutions be frozen. Such a freeze would simply be another, old-fashioned implicit subsidy, which the Commission is precluded by Section 254(e) from permitting or maintaining. The Rural Consumer Choice Coalition does not object to allowing the incumbent LECs voluntarily to forego collection of a portion of the SLC from these customers, provided that those revenues are treated as a voluntary rate reduction, are not simply shifted to other SLCs, carrier charges or the ICLS for recovery, and are non-predatory.

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[5] *Texas Office of Public Utility Counsel*, 18 F.3d 393, 425 (5th Cir. 1999) ("*TOPUC I*").

II. PORTABILITY OF UNIVERSAL SERVICE SUPPORT IS LONG-SETTLED AND PETITIONERS PRESENT NO NEW ARGUMENTS TO JUSTIFY A CHANGE IN POLICY.

NTCA, AIRTC, SDTA and Western Alliance object to the Commission's determination that ICLS support should be available on the same terms to competitive telecommunications carriers (CETCs) in high-cost areas as to the rate-of-return ILECs with which CETCs compete.[7] Their arguments, however, break no new ground; they merely revisit Commission policies with which SDTA, Western Alliance, and NCTA have long disagreed. The Commission should once again reject petitioners' efforts to preserve their historical, government-buttressed monopoly over the provision of supported services, and to prevent the introduction of market forces to control the costs of providing such services

A. Petitioners' Arguments Are Contrary To Core Principles Of Universal Service Support Adopted By The Commission.

The objections to ICLS portability advanced by SDTA, the Western Alliance, and NTCA are inconsistent with well-established principles adopted by the Commission's universal service decisions. As further discussed in Part II.B, *infra*, these petitioners raise questions about the level at which support for non-traffic-sensitive ("NTS") costs should be set, and the portability of ICLS support as determined in the *MAG Order*. The Commission has long settled that to preserve universal service and promote competition in a competitively neutral manner, each competing eligible telecommunications carrier, whether incumbent LEC or CLEC, must receive the same amount of universal service support per line, portable to the carrier that wins the

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[6] 87 F.3d 522 (D.C. Cir. 1996).

[7] *See* South Dakota Telecommunications Association Petition for Reconsideration at 4-8 ("SDTA Petition"); Western Alliance Petition for Reconsideration at 5-16 ("Western Alliance Petition"); National Telephone Cooperative Association Petition for Reconsideration at 4-10 ("NTCA Petition"); Alliance of Independent Rural Telephone Companies Petition for Reconsideration at 3-10, 17-19 ("AIRTC Petition").

customer. This is what would happen in an unsubsidized market – and what occurred with respect to implicit subsidies in access charges. Petitioners offer no plausible reason why ICLS support should be treated differently than all other universal service support with respect to full portability of support between ILECs and eligible CLECs.

In the *Universal Service First Report and Order*,[8] the Commission expressly rejected claims that "providing support to CLECs based on the incumbents' embedded costs gives preferential treatment to competitors and is thus contrary to the Act."[9] To the contrary, the Commission directed that "[w]hen a line is served by an eligible telecommunications carrier, either an ILEC or a CLEC, through the carrier's owned and constructed facilities, the support flows to the carrier because that carrier is incurring the economic costs of serving that line."[10] The Commission further determined that "a competitive eligible telecommunications carrier that wins a customer from an incumbent LEC will receive the same level of universal service support for that customer as the incumbent LEC would have been eligible to receive for serving that customer."[11] The Commission concluded that "paying support to a CLEC that wins the customer's lines or adds new subscriber lines would aid the emergence of competition."[12]

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[8] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776 (1997) ("*Universal Service First Report and Order*").

[9] *Universal Service First Report and Order*, 12 FCC Rcd. at 8934. The support addressed in that order included Long Term Support, Local Switching Support, and High Cost Loop Support, all of which were calculated using ILEC embedded costs, and then provided to the eligible CLEC on a per line basis when the CLEC won an end user customer.

[10] *Id.* at 8932.

[11] *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd. 5318, 5365 (1997), *aff'd sub nom. Alenco v. FCC*, 201 F.3d 608 (5th Cir. 2000).

[12] *Universal Service First Report and Order*, 12 FCC Rcd. at 8932-33.

The *Universal Service First Report and Order* also emphasized that full portability of explicit universal service support from the ILEC to the CLEC is necessary to prevent universal service support from acting as a crutch for an incumbent LEC's inefficiency. The Commission explained: "If the CLEC can serve the customer's line at a much lower cost than the incumbent, this may indicate a less than efficient ILEC."[13] Rather than using universal service support to shield the ILEC from competition, the Commission found that with full portability of universal service support, "[t]he presence of a more efficient competitor will require that ILEC to increase its efficiency or lose customers."[14]

When the Fifth Circuit reviewed the FCC's decisions in the *First Universal Service Report and Order* and its subsequent *Fourth Reconsideration Order*, the court upheld the Commission's determinations against ILEC assertions that full portability of universal service support based on ILEC embedded costs violated the sufficiency requirements of Section 254(e). In rejecting these challenges, the Court ruled that "portability is not only consistent with predictability, but also is *dictated* by principles of competitive neutrality and the statutory command that universal service support be spent 'only for the provision, maintenance, and upgrading of facilities and services for which the [universal service] support is intended."[15]

When the Commission was considering its non-rural forward-looking high cost and "hold harmless" support, in both the *Universal Service Seventh Report and Order*[16] and the

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[13] *Id.* at 8933.

[14] *Id.*

[15] *Alenco*, 201 F.3d at 622 (quoting 47 U.S.C. § 254(e)) (emphasis added).

[16] *Federal-State Joint Board on Universal Service*, Seventh Report and Order, 12 FCC Rcd. 8078, 8113-14 (1999) ("*Universal Service Seventh Report and Order*").

Universal Service Ninth Report and Order,[17] it again considered the amount of universal service support that would be portable when a customer moved from an ILEC to an eligible CLEC, and concluded that "the same amount of support . . . received by an incumbent LEC should be portable to competitive providers," regardless of whether that was forward-looking support or "hold harmless" support calculated based on the ILEC's embedded costs.[18] The Commission explained that "while hold-harmless amounts do not necessarily reflect the forward-looking cost of serving customers in a particular area, we believe this concern is outweighed by the competitive harm that could be cased by providing unequal support amounts to incumbents and competitors."[19] Specifically, "unequal federal funding could discourage competitive entry in high-cost areas and stifle a competitor's ability to provide service at rates competitive to those of the incumbent."[20]

When the Commission created Interstate Access Universal Service Support in the *CALLS Order*, it again applied these settled principles of full portability of support between ILECs and eligible CLECs to explicit universal service support that replaced implicit support previously provided through interstate access charges. The CALLS distribution methodology for Interstate Access Universal Service Support provided "per-line support," available equally to ILECs and CLECs: "[I]f a competitor serves a customer in a supported . . . zone, the competitor will receive the incumbent's support for that line."[21] The Commission concluded that "[b]ecause the support

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[17] *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd. 20432 (1999) ("*Universal Service Ninth Report and Order*").

[18] *Id.* at 20480.

[19] *Id.*

[20] *Id.*

[21] *Access Charge Reform, Price Cap Performance Review For Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249,

provided under the CALLS Proposal is portable among all eligible telecommunications carriers serving a supported customer, regardless of whether they are incumbents or competitors and regardless of the technology they use, the distribution methodology is competitively neutral."[22]

The portability provisions of the *MAG Order* challenged by SDTA, NCTA, and the Western Alliance are merely the latest application of these long-standing principles. Citing the *Universal Service First Report and Order*, the *MAG Order* emphasized that "universal service support mechanisms and rules should neither unfairly advantage nor disadvantage one provider over another."[23] "Consistent with this principle," the Commission wrote, "universal service support [must be] 'portable,' in essence, available to all competing telecommunications providers."[24] There is no reasonable distinction between ICLS and all other forms of universal service support, including LTS, local switching support, and hold harmless support, all of which are based upon ILEC embedded costs, but made fully portable to CLECs without making a separate CLEC cost determination.

B. Petitioners' Scattershot Array Of Objections To Portability Are Meritless.

Entirely ignoring the precedents discussed above, AIRTC, SDTA, NCTA and the Western Alliance present a hodgepodge of objections to full portability of ICLS support between ILECs and eligible CLECS, as established by the *MAG Order*. Upon closer review, those objections are entirely insubstantial.

Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd. 12962, 13053 (2000) ("*CALLS Order*").

[22] *Id.*

[23] *MAG Order*, ¶ 151.

[24] *Id.*

1. AIRTC's argument that the Commission cannot seek to recover all ILEC loop costs from the end user is baseless.

AIRTC argues that the preamble of the Act should be interpreted to preclude the SLC from ever increasing. There is no basis in law for according such authority to preamble language, and petitioners cite none. The Commission properly rejected claims that increases in the SLC would harm affordability, recognizing that these SLC rates were already being charged in other rural areas served by non-rate-of-return companies, without any harm to subscribership. Petitioners seek to have consumers in high cost areas pay *lower* rates than consumers in urban areas, a mandate found nowhere in the Act, and a result that is wholly economically perverse.

To the extent that AIRTC is claiming that the Commission lacks authority to recover loop costs wholly from end users, rather than from some combination of end users and interconnecting long distance carriers (who then pass the charge on to their end user callers), that argument ignores the holdings of the Eighth Circuit in *Southwestern Bell v. FCC*[25] and the Fifth Circuit in *TOPUC II*.[26] The law is clear – the Commission can legally recover 100% of loop and other non-traffic sensitive marketing and residual TIC costs from the end user, and the Commission has found that doing so is the most efficient form of cost recovery.[27]

2. The Commission properly found that ICLS support replaces the CCL charge.

Petitioners SDTA and AIRTC argue that the Commission's decision to replace all of the revenues currently collected by rate-of-return carriers through the CCL with ICLS support is "arbitrary and capricious" because "the entire category of CCL costs is not an implicit

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[25] 153 F.3d 523 (8th Cir. 1998).

[26] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) ("*TOPUC II*").

[27] *CALLS Order*, 15 FCC Rcd. at 12993-94.

subsidy."[28] This argument is flawed in several respects. First, SDTA and AIRTC ignore the fact that the Commission itself has repeatedly found that "the entire category of CCL costs" *is* an implicit subsidy. In its *1997 Access Reform Order*,[29] the Commission wrote:

> Because NTS [non-traffic-sensitive] costs, by definition, do not vary with usage, the recovery of NTS costs on a usage basis pursuant to our current access charge rules amounts to an *implicit subsidy* from high-volume users of interstate toll services to low-volume users of interstate long-distance services.[30]

In the same *Order* the Commission also observed – even more unambiguously – that "the current per-minute CCL charge that recovers loop costs represents an economically inefficient cost-recovery mechanism and implicit subsidy."[31] Accordingly, as members of the RCC Coalition explained earlier in this proceeding, opponents of explicit support "cannot now wish away the fact that the CCL charge is 'the manipulation of rates for some customers to subsidize affordable rates for others,' and therefore constitutes an implicit subsidy. . . ."[32]

Second, this conclusion is reinforced by cost causation principles adopted by the Commission and affirmed by the courts, which dictate that NTS costs should be recovered in NTS charges. As the Eighth Circuit explained in *Southwestern Bell v. FCC*, "[s]imply by requesting telephone service, the subscriber 'causes' local loop costs, whether it uses the service for intrastate or interstate calls. . . . It is therefore appropriate and reasonable for the

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[28] SDTA Petition at 3-5; *see also* AIRTC Petition at 17-19.

[29] *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982 (1997) ("*1997 Access Reform Order*").

[30] *Id*. (emphasis added).

[31] *Id.* at 16008.

[32] *See* Letter of John Nakahata to Jane E. Jackson and Katherine Schroder (filed Aug. 28, 2001), at 3.

Commission to impose those costs on the end user."[33] *Southwestern Bell* and *TOPUC II* clearly establish that it is not "arbitrary and capricious" to recover all NTS loop, marketing and non-facilities residual TIC costs from the end user and none from the long distance carrier. SDTA and AIRTC do not – and cannot – explain how substituting explicit universal service payments for payments by end users could suddenly render that recovery "arbitrary."

Indeed, if one starts from the proposition – as all FCC SLC rules do for both price cap and non-price cap carriers – that non-traffic sensitive loop, marketing and residual non-facilities specific TIC costs should be recovered from the end users in order to have the most efficient rate structure and minimize transactions costs,[34] then the subsidy nature of the CCL is self-evident. The CCL exists only to recover those loop, marketing and residual TIC costs that cannot be collected through SLCs.[35] For rate-of-return carriers with common line revenue requirements below the SLC caps, all common line costs are recovered from the SLC. By shifting cost recovery through the CCL, rates for long distance service are "manipulat[ed] . . . for some customers to subsidize more affordable rates for others."[36]

SDTA's arguments that the D.C. Circuit's decision in *Rural Telephone Coalition v. FCC*[37] and the Supreme Court's decision in *Smith v. Illinois Bell*[38] preclude the Commission from concluding that the CCL is an "implicit subsidy" are meritless. As the D.C. Circuit has

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33 153 F.3d at 557 (citing *National Ass'n of Regulatory Utility Comm'rs*, 737 F.2d 1095, 1113-14 (D.C. Cir. 1984) ("*NARUC*"), and *1997 Access Reform Order*, 12 FCC Rcd. at 16012).

34 *See MAG Order*, ¶ 33; *CALLS Order*, 15 FCC Rcd. at 12993-94.

35 *See NARUC*, 737 F.2d at 1119; *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, 695 (1983) (adopting transitional SLC caps to protect universal service).

36 *TOPUC I*, 183 F.3d. at 406.

37 838 F.2d 1307 (D.C. Cir. 1988).

38 282 U.S. 133 (1930).

recognized, *Smith v. Illinois Bell* has no application to proper structure of cost *recovery* of interstate allocated costs, and therefore no bearing on whether the CCL is an implicit subsidy.[39] *RTC v. FCC* both preceded the 1996 Act's direction that subsidies be made explicit, and also addressed cost allocation, not cost recovery. Indeed, the main reason that the *RTC* court distinguished *Smith v. Illinois Bell* and rejected MCI's argument that the cost allocation created an impermissible subsidy under the pre-1996 Communications Act was that the court "view[ed] the twenty-five percent NTS cost allocation as a step on the road towards an efficient national telephone rate structure based primarily on access charges levied directly on customers."[40] In any event, the 1996 Act passed, and precludes the FCC from "maintaining" an implicit subsidy.[41]

Finally, to the extent that SDTA argues that NTS costs that are *not* costs of providing universal service should not be recovered through universal service support, the appropriate solution would be to raise SLC caps to permit recovery rather than to institute non-cost causative access charges to recover those costs. The FCC has yet to conduct a full evaluation of the levels of the SLC that would affect affordability for non-Lifeline customers, but there is no reason to assume that SLC caps, even at full implementation of the *MAG Order,* will be approaching the limit of affordability. SDTA and AIRTC notably avoid suggesting this alternative, which would be consistent with competitive neutrality but would reduce the amount of portable support so that costs of non-supported services could not be recovered from the ICLS.

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39 *NARUC*, 737 F.2d at 1114.

40 *RTC*, 838 F.2d at 1314-15.

41 *COMSAT Corp. v. FCC*, 250 F.3d 931, 938 (5th Cir. 2001).

3. The Commission properly found that CETCs should receive the same ICLS support as ILECs for serving the same customer.

SDTA and the Western Alliance argue at length that CETCs should not receive the same ICLS support as ILECs for serving the same customer.[42] According to these petitioners, ICLS support based on ILEC costs will offer CETCs "inappropriate windfall gains,"[43] and will result in "a massive cross-subsidy . . . to non-incumbent competitors."[44] This argument is fatally flawed in several respects.

First, the claim that ICLS support should not be available to CETCs on the same terms as to ILECs simply ignores the Commission precedents discussed *supra* in Part II.A. A straightforward application of the principles established in those precedents mandates portability here. In rate-of-return areas, as elsewhere, "[i]f the CLEC can serve the customer's line at a much lower cost than the incumbent, this may indicate a less than efficient ILEC."[45] As the Commission has long recognized, portability will benefit consumers both by encouraging "competition in high cost areas,"[46] and by bringing market pressures to increase efficiency to bear on incumbents.

To the extent ILECs are seeking to receive a differential subsidy from that provided to their competitors, they seek what the Fifth Circuit recognized to be "the very antithesis of the Act" – "protection from competition."[47] ILECs are seeking a guarantee that if they are *less efficient* at delivering the same service as a competitor, they should receive a greater subsidy so

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42 *See* SDTA Petition at 4-8; Western Alliance Petition at 7-12.

43 Western Alliance Petition at 7.

44 SDTA Petition at 6.

45 *Universal Service First Report and Order*, 12 FCC Rcd. at 8933.

46 *Id.* at 8932-33.

47 *Alenco,* 201 F.3d at 622.

that the invisible hand of the market never lays a glove on them to force them to become more efficient – an astounding request that the Commission correctly rejected in 1997. Once again "miss[ing] the goal of the [1996] Act," the ILECs seek to convert a universal service system that Congress enacted to provide "sufficient funding of *customers*" into a corporate welfare program for ILEC providers.[48]

In advocating differential subsidies, petitioners also seek an unprecedented level of government engineering of the market. In a competitive marketplace without subsidies, the provider winning a customer would receive all of the revenues associated with that customer, including those relating to the provision of universal service. Indeed, even under the system of "implicit" subsidies rejected by the 1996 Act, the subsidy was collected by the entity serving the subsidizing customer. Only in petitioners' world of differential subsidies would the government skew the revenues received for serving a customer based on the type of company providing the service. Such bald government manipulation of the marketplace is clearly inappropriate.

Second, SDTA's and the Western Alliance's allegations of ICLS "windfalls" to CETCs lack any specific, factual basis. The expert affidavit attached to an attachment to the SDTA petition merely assumes that wireless costs are below those of ILECs, without analyzing the truth of the assumption. In fact, if the Commission were to try to examine CLEC costs – which it should not and need not do – it would have to recognize many significant and unique factors of entering a market to compete with an incumbent, including, for example, that an entering CLEC will have a higher cost of capital than the ILEC, which in part reflects that the CLEC must build a system before it can have revenues from the system; that the CLEC must acquire each customer that it serves

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[48] *Id*. at 619.

(incurring substantial customer acquisition costs) in contrast to an ILEC that starts with a 100% market share; and that because the ILEC starts with 100% of the customers it has a larger base of customers in that specific ILEC service area over which to spread its fixed costs. CETCs have not asked for the Commission to subsidize their entry to reflect their high start-up costs – but that result would be compelled by the "logic" of the ILEC argument that universal service subsidies should be based on each ETC's own costs. There is no reason for the Commission now to depart from its established principles of setting universal service based on incumbent LEC costs, and then making support fully portable to competitive ETCs.

SDTA and Western Alliance are particularly concerned that *wireless* CETCs will receive "windfalls."[1] They ascribe great significance to the fact that wireless CETCs are exempt from certain requirements applicable to rural ILECs. These fables of woe ignore the tremendous benefits the ILEC has from its position as the historic monopolist, and are therefore wholly incomplete. If the Commission were to find that competitors' costs of providing service are lower than ILEC costs, however, petitioners prescribe the wrong solution. Rather than paying differential subsidies to support ILEC inefficiency, the ILEC subsidy should be reduced to the level justified by the CLEC's costs and the ILEC's recovery of its inefficiency should either be disallowed or recovered – if at all – from end users. These inefficiency costs legally cannot, and as a policy matter should not, be passed on to other consumers in the form of higher universal service contribution fees or an implicit subsidy built into access charges.[49]

In reality, the arguments of SDTA, NCTA, and the Western Alliance for basing CLEC universal service support on individual CLECs' costs are most likely motivated by the desire to

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[49] *COMSAT*, 250 F.3d at 938.

raise rivals costs with regulatory requirements that are unnecessary because CLECs lack market power and must enter the market in reaction to ILEC prices. As the Joint Board noted in its *Recommended Decision*, "requiring CLECs to submit cost studies would be problematic because CLECs are not required to follow Commission accounting and jurisdictional separations rules . . . ."[50] That remains a sound reason for rejecting ILEC pleas to place additional regulatory reporting burdens on their competitors.

4. Rural customers will be helped, not harmed, by the Commission's decision to make ICLS portable.

The Western Alliance argues that "rural customers will be the ultimate victims of a portable ICLS mechanism," because competitors "that enter[] a rural market for a primary or substantial purpose of taking universal service support from the pre-existing ILEC [are] not likely to remain in the market . . . when the portable universal support is limited, reduced or terminated."[51] Both premises of this argument are incorrect.

First, the notion that CETCs will simply exit the market as support is reduced ignores the fact that wireless providers have spent millions of dollars to build out facilities-based systems to serve rural areas. It is ridiculous to suggest that companies would construct such costly networks for ICLS support, only to abandon them later.

Second, as the Commission has long recognized, rural customers will ultimately be helped, not harmed, by the introduction of greater competition into rural areas. As the Commission observed its landmark *Universal Service First Report and Order*, "we believe these commenters present a false choice between competition and universal service."[52] Petitioners cite

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[50] *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd. 87, 239 (1996).

[51] Western Alliance Petition at 14-15.

[52] *Universal Service First Report and Order*,12 FCC Rcd. at 8803.

no evidence to show that monopolies in rural areas are significantly less prone to inefficiencies than monopolies in urban areas, and there is no reason to believe that competition will not ensure that customers in rural areas receive the highest quality, most innovative service at the lowest possible price.

III. THE ICLS RULES ARE ENTIRELY CONSISTENT WITH SECTION 254(e) AND SECTION 254(k).

Petitioner NTCA argues that making ICLS support available to CETCs violates Section 254(e). Specifically, NTCA claims that because CETCs are not subject to accounting, separations, and tariff-filing rules like those applicable to rate-of-return carriers, the Commission will be unable to ensure that ICLS support supplied to CETCs will – as required by Section 254(e) – be "sufficient" to achieve the purposes of universal service, and will be spent only on the services for which the support is intended. *See* 47 U.S.C. § 254(e). Like the other objections to portability discussed above, however, NTCA's Section 254(e) claim is a recycled claim that has been repeatedly rejected by both the Commission and the courts.

In the *Universal Service First Report and Order*, for example, a number of commenters argued that any universal service support not based on the actual costs of individual carriers would violate the requirements of Section 254(e).[53] The Commission, however, flatly rejected that suggestion, holding that CLEC and ILEC recovery for serving the same lines must be identical to avoid "plac[ing] either the ILEC or the CLEC at a competitive disadvantage."[54] The Commission concluded in no uncertain terms: "We thus disagree with commenters that assert

[53] *See, e.g.,* Comments of the Western Alliance, CC Docket No. 96-45 (April 12, 1996).

[54] *Universal Service First Report and Order*, 12 FCC Rcd. at 8945.

that providing support to eligible CLECs based on incumbents' costs would violate Section 254(e)."[55]

NTCA's statutory arguments fared no better in the courts. In *Alenco*, an array of petitioners argued at length that portability of universal service contravenes Section 254's requirements of "sufficient" and "predictable" support.[56] The Fifth Circuit disagreed, finding that "'sufficient' funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy . . . . What petitioners [really] seek . . . . is protection from competition, the very antithesis of the Act."[57] Moreover, the court held, portability is not merely *consistent* with the Act, but actually *required* by the very provision upon which NTCA attempts to rely: "[P]ortability is not only consistent with predictability, but also is dictated by principles of competitive neutrality and the statutory command that universal service support be spent 'only for the provision, maintenance, and upgrading of facilities and services for which the [universal service] support is intended.' 47 U.S.C. § 254(e)."[58]

NCTA's statutory argument also ignores the Commission's view that that certification is adequate to ensure that ICLS support will be spent only on supported services. As the Commission pointed out in the *Universal Service Seventh Report and Order*, a number of procedures already in place ensure the accuracy of certification:

> [I]f a carrier has not applied its universal service high-cost support in a manner consistent with section 254, we have the authority to take appropriate enforcement actions. . . [O]ther parties may petition the Commission, pursuant to section 208 of the Act, if such parties believe that a common carrier has misapplied its

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[55] *Id.*

[56] *See Alenco Communications, Inc. v. FCC* (5th Cir.), Brief for Petitioners at 28-34 (August 28, 1998).

[57] *Alenco*, 201 F.3d at 621-22.

[58] *Id.* at 622.

> high-cost universal service support . . . Depending on the nature of the complaint, furthermore, a complaint filed by a party against a common carrier alleging misapplication of universal service high-cost support could qualify for resolution under the Commission's 'accelerated docket' procedures.[59]

The Commission has thus already provided for the unlikely possibility that ICLS support will be spent on non-universal support, and need not address that issue again here.

Finally, NTCA's invocation of Section 254(k) is based on a wholly unexplained and undocumented premise. There is no evidence that ICLS would allow a carrier to use services that are not competitive to subsidize competitive services. As previously stated, if the Commission ever develops evidence that ICLS is subsidizing ILEC inefficiency and therefore over-compensating a more efficient CLEC, it can reduce support *to all eligible carriers* in that market at that time.

IV. THE PLAINS COMPANIES' PETITION MUST BE REJECTED BECAUSE IT IGNORES ALL LAW SINCE 1996.

Plains Companies request to reconsider the *MAG Order* provisions addressing reallocation of the Transport Interconnection Charge ("TIC") must be rejected because the Plains Companies simply ignore all Commission and judicial holdings since the D.C. Circuit's decision in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) ("*CompTel I* "), as well as the actions Plains Companies should have taken pursuant to those Commission orders. Although the *MAG Order* itself applies these precedents improperly – as set forth in the RCC petition[60] – the actions Plains Companies request would be wholly contrary to law and prior Commission decisions.

[59] *Universal Service Seventh Report and Order*, 14 FCC Rcd. at 8115-16.

[60] Rural Consumer Choice Coalition Petition for Reconsideration at 16-19.

In *CompTel I*, the D.C. Circuit held that the Commission had not adequately justified the existence of the TIC, which the Commission had conceded was a non-cost-based rate. The court remanded to the Commission with the instruction "to move expeditiously upon remand to a cost-based alternative to the [T]IC, or to provide a reasoned explanation of why a departure from cost-based ratemaking is necessary and desirable in this context."[61]

The FCC addressed *CompTel I* in the 1997 *Access Reform Order*, directing all incumbent LECs (not just price cap regulated LECs) to take a number of steps to reallocate costs from the TIC to service-specific elements.[62] Among the costs the Commission directed to be reallocated to service-specific elements were the 80% of tandem switching costs that had been recovered through the TIC instead of the tandem switching rate.[63]

The 1997 *Order* also directed price cap LECs (but not non-price cap LECs) to shift recovery of the remaining non-service specific TIC costs from the TIC element to PICCs. The Commission explained:

> Because the limited evidence in the record suggests that at least some amount of the residual TIC represents NTS costs, and because we wish to see that consumers enjoy the benefits of usage of the network to the greatest extent possible, we find that we should err, if at all, on the side of NTS recovery of these costs. For elements not demonstrably reflecting usage-sensitive costs, therefore, we find, on balance compelling policy arguments in favor of flat-rated pricing because usage-sensitive recovery of any NTS costs artificially suppresses demand for interexchange calling by inflating per minute rates.[64]

[61] 87 F.3d at 532.

[62] 12 FCC Rcd. at 16074. *See also Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, Notice of Proposed Rulemaking, 13 FCC Rcd. 14238, 14230 (1998) ("*ROR Access Reform NPRM*").

[63] *1997 Access Reform Order*, 12 FCC Rcd. at 16076.

[64] *Id*. at 16083. Although the FCC originally collected these costs through the PICC, in the *CALLS Order* it shifted PICC-based collection to the SLC. Thus, references to flat-rate charges paid "by IXCs" have been superceded.

The Commission concluded that "[i]n the absence of definitive evidence as to the nature of the residual TIC amounts," the "the public interest would be better served by imposing these costs . . . on a flat per-line basis, rather than on a per minute basis." Accordingly, the Commission "require[d] price cap LECs to recover residual TIC amounts not otherwise eliminated . . . through the flat-rated PICC.[65] That transition occurred over the next several years.[66]

The 1997 *Order* also noted that some of the costs remaining in the TIC after these reallocations stemmed at least in part from two sources: differences in the assignment of costs through separations to private line and switched services, resulting in lower allocations to special access; and the fact that the cost of providing transport services in less densely populated areas is higher than that reflected by transport rates derived from special access.[67] The Commission concluded that it did not have before it sufficient information to quantify these cost differentials, but attempted to address them in part by requiring reallocation of additional TIC amounts to facilities-based transport rates when a LEC geographically deaveraged its transport rates.[68]

In 1998, in the *ROR Access Reform NPRM*, the Commission acknowledged that, "as with price cap LECs, the reallocation of costs from the TIC to other rate elements will not remove all of the costs from the TIC [charged by rate-of-return LECs]."[69] Thus, when the Commission

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[65] *Id*. at 16084.

[66] In *Southwestern Bell v. FCC*, the Eighth Circuit upheld the FCC's decision to eliminate the non-service specific TIC by gradually shifting recovery to the PICC, a common line rate element. 153 F.3d 523, 549-550 (8th Cir. 1998). In the *CALLS Order*, TIC recovery was in turn shifted from the PICC to the SLC in most areas by eliminating the residential and single line business PICCs and increasing primary residential and single line business SLC caps. 15 FCC Rcd. at 12991.

[67] *1997 Access Reform Order*, 12 FCC Rcd. at 16079. The Commission also suggested that some residual TIC costs might more appropriately be allocated to intrastate services. *Id.*

[68] *Id.* at 16080.

[69] *ROR Access Reform NPRM*, 13 FCC Rcd. at 14262.

issued its initial NPRM on access charge reform for rate-of-return carriers, it still had not yet completed its response to the *CompTel I* remand instructions with respect to rate-of-return LECs. The Commission therefore proposed "to incorporate the residual TIC in the common line pricing structure just as we did for price cap LECs."[70] At the same time, the Commission sought comment on whether "there are additional causes of costs remaining in the residual TIC for rate-of-return LECs that have not been identified previously that would justify further reallocations of costs from the TIC."[71]

In addition, consistent with the 1997 Order's finding that costs remaining in the TIC after reallocation of facilities-specific costs stemmed in part from the way that the separations process assigned costs to private line and message services, the FCC issued a comprehensive Notice of Proposed Rulemaking on separations reform.[72] Acting on a Recommended Decision of the Separations Joint Board, in 2001 the Commission adopted an up to five-year interim freeze of Part 36 category relationships and jurisdictional cost allocation factors, pending comprehensive reform of the Part 36 separations rules.[73]

Because of the reallocation of service-specific costs that occurred as a result of the 1997 *Access Charge Reform First Report and Order*, Plains Companies are simply wrong when they assert that the residual TIC charges reallocated under the *MAG Order* include tandem switching costs that should have been allocated to tandem switching but which were allocated instead to

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70 *Id*.

71 *Id*.

72 *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FCC Rcd. 22120 (1997).

73 *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd. 11382 (2001).

the TIC to avoid an adverse impact on small IXCs.[74] These costs were fully reallocated under the *Access Charge Reform First Report and Order*,[75] and if such costs remained in the TIC, it would be only as a result of Plains Companies' violations of FCC rules. In addition, the 1997 *Order* directed that tandem switched transport rates be calculated using actual minutes of use, rather than an assumed level of 9000 minutes of use.[76] That reform further removed tandem switched transport-specific costs from the TIC.

In the *MAG Order*, the Commission concluded that it could still not determine the portion of the residual costs not reallocated in 1997 that were still recovered through the TIC, but were that are truly transport related. Thus, it allocated some of the remaining residual TIC costs to transport charges.[77] Consistent with its 1997 findings, the Commission clearly did not believe, however, that all the residual TIC costs were transport related, and Plains Companies cite no new evidence to indicate that all residual transport costs were transport-related. Moreover, the Commission could no longer assume that it would correct separations distortions through separations reform, as it had just entered its *Separations Freeze Order* lasting for five years.[78]

Reallocating a portion of the residual TIC costs to transport and a portion to common line in the light of a lack of further specific cost data was therefore a reasonable, if belated, response to the 1996 *CompTel I* decision. Nearly six years after *CompTel I*, the Commission needed to provide some response with respect to the residual TIC charged by rate-of-return LECs – further delay would have been wholly inappropriate. The Commission's error in applying prior

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[74] Plains Company Petition at 8.

[75] 12 FCC Rcd. at 16076.

[76] *Id*.

[77] *MAG Order*, ¶101.

[78] *See* 16 FCC Rcd. at 11382-83.

precedents was in shifting residual TIC costs to local switching, which contradicts both its reasoning in the 1997 *First Access Reform Report and Order* to err on the side of non-traffic sensitive recovery, and the limited evidence of the nature of underlying costs, which pointed only toward reallocating TIC costs to transport and common line rates but not to local switching rates. Thus, the Plains Companies' petition for reconsideration of the TIC treatment should be rejected, but the RCC petition for reconsideration with respect to the TIC should be granted.

V. THE COMMISSION SHOULD REJECT ALL REQUESTS TO ROLL BACK ACCESS REFORMS THAT HAVE ALREADY OCCURRED.

NTCA and CenturyTel ask the Commission to roll back changes that have already occurred. There is no reason for the Commission to do so.

CenturyTel requests that the reallocation of line port and TIC costs be deferred until July 1, 2002. However, these reallocations already occurred on January 1, 2002. CenturyTel does not assert that its request meets the Commission's extraordinary standards for a stay, but it is in effect asking that a stay be imposed retroactively. At this late date, when parties have already implemented the new rates, it would substantially harm other parties to reverse the status quo.

In any event, CenturyTel provides no explanation of why the Commission should reverse the status quo solely to provide it assistance with intrastate access rate issues that it should long ago have raised with state regulators.[79] The MAG plan was proposed well over 15 months ago, and clearly contemplated significant decreases in interstate access rates. The Commission has

[79] CenturyTel's suggestion that the *MAG Order* contravenes the Tenth Circuit's decision in *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001), by taking "unilateral federal action" on high-cost support without "develop[ing] mechanisms to induce state action," *see* CenturyTel Comments at 6 , thoroughly mischaracterizes the *Qwest* case. Nothing in the Tenth Circuit's decision requires the Commission to delay the reform of federal universal service mechanisms pending state action.

been considering reallocations of line port and TIC costs for rate-of-return carriers since 1998. There is no reason for long distance consumers to fund a "bail out" because of CenturyTel's regulatory inattention.

Similarly, there is no reason to go back now and reverse the increase in the multiline business SLC caps that were implemented on January 1, 2002, as NTCA requests.[80] Other than citing the fact that an economic recession has occurred, NTCA provides no data to support its request. There is no evidence that reversal of the SLC caps would do anything other than churn rates.

NTCA's request to roll back permanently the SLC increases that have already occurred for public service institutions equally lacks merit.[81] In the first instance, to the extent NTCA proposes to transfer recovery of these costs to other end users in the form of higher SLCs or to interconnecting long distance carriers in the form of higher access charges, NTCA's proposal would create an unlawful implicit subsidy.[82] If it is in the public interest to subsidize even further these institutions' connections to the public switched telephone network, that must be done through explicit mechanisms. To the extent that NTCA is asking that its members be allowed to forego collection of these increased SLCs as a voluntary reduction, and the revenue is in no way shifted to other users, carriers or the ICLS, and the rates are non-predatory, NTCA's members may already do so.

VI. CONCLUSION

For the foregoing reasons, the ILEC petitions for reconsideration should be denied in their entirety.

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[80] *See* NTCA Comments at 11.

[81] *Id.* at 13-14.

[82] *See COMSAT*, 250 F.3d at 938.

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February 14, 2002

CERTIFICATE OF SERVICE

I, Timothy Simeone, hereby certify that a copy of the foregoing Rural Consumer Choice Coalition Opposition to Petitions for Reconsideration was served this 14th day of February, 2002 via hand-delivery or fax, for the parties indicated with an *, and by first-class mail, postage prepaid for all other parties:

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